Chong Yuong Wee & Ors v Menteri Perumahan dan Kerajaan Tempatan, Kementerian Perumahan dan Kerajaan Tempatan & Ors

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW APPLICATION NO WA-25–561–11 OF 2022
AHMAD KAMAL J
22 JULY 2024

Administrative Law — Judicial review — Application for — Purchasers of strata parcels filed judicial review application against decision of minister in granting developer third exemption pursuant to s 38C of Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) (Amendment) Act 2022 ('Act A1641') — Whether minister could consider application for exemption after expiry of period to deliver vacant possession — Whether Director General of National Housing Department had power to sign letters granting extension of time under Act A1641 — Whether extension of time granted under Act A1641 was made without consent of purchasers, without purchasers being given right to be heard and without taking into account relevant considerations — Whether s 38C of Act A1641 was unconstitutional — Whether exemption given by minister tainted with illegality, irrationality and procedural impropriety — Federal Constitution — Housing Development (Control and Licensing) Act 1966 — Rules of Court 2012 O 53 — Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ss 35(1), (2), (3), 38, 38B, 38C(1), (3), 38D & 38E — Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) (Amendment) Act 2022

Statutory Interpretation — Canons of construction — Purposive approach — Interpretation of s 38, 38C(1) and (3) of Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ('Act 829') — Whether s 38 of Act 829 and s 38C(1) and (3) of Act A1641 should be interpreted literally or purposively

In the present case, the applicants were the purchasers of strata parcels in a residential development known as Senada Kiara, the first respondent was the minister in charge of matters concerning housing developments, the second respondent was the Director General of the National Housing Department and lastly the third respondent was the developer of Senada Kiara. The applicants filed the present judicial review application pursuant to O 53 of the Rules of Court 2012 to seek an order of certiorari to quash the decision of the first respondent in granting the developer the third exemption of 214 days for the period from 1 January 2021 to 31 December 2021 under s 38C of the

Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) (Amendment) Act 2022 ('Act A1641') wherein the said 214 days in that period would be excluded in the calculation of the time period for delivery of vacant possession and completion of common facilities. The applicants submitted that: (a) there had been a breach of s 38C of Act A1641 wherein the said provision did not give the right to the first respondent to consider an application by the third respondent after the expiry of the period to deliver vacant possession ('the first issue'); (b) the second respondent had no power to sign any letters granting extension of time ('EOT') under Act A1641 and the Housing Development (Control and Licensing) Act 1966 ('the second issue'); (c) the EOT granted by the first respondent by way of a letter dated 26 April 2022 ('the said letter') signed by the second respondent was done without the consent of the applicants, without the applicants being given a right to be heard and without taking into account relevant considerations ('the third issue'); and (d) s 38C of Act A1641 was unconstitutional ('the fourth issue').

Held, dismissing the applicants' application for judicial review with costs of RM2,500 without allocator to be paid by the applicants to the first and second respondents and costs of RM2,500 subject to the allocator to be paid by the applicants to the third respondent:

(1) The real or actual purpose of the prohibition found in s 38C(3) of Act A1641 was in relation to a delay in handing vacant possession for sale and purchase agreement ('SPA') expiring before 18 March 2020 or which had nothing to do with or was not caused by the various restrictions imposed as part of the measures to curb the spread of the virus. Section 38C(3) did not apply to a situation where the completion period had been exempted under s 35(1), (2) and (3) of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ('Act 829') pursuant to the first and second exemption. In situations where the first and/or second exemption applied, the completion period no longer followed the original completion period as stipulated in the SPA. In the present case, since the applicants accepted the validity of the first and second exemption, there could be no question of any delay in the construction progress, but for the COVID-19 lockdown which was implemented beginning 18 March 2020. Therefore, the prohibition in s 38C(3) of Act A1641 did not apply to the third respondent in the present case (see paras 22, 25, 27 & 29).

(2) Section 38C(3) of Act A1641 was an extension of the temporary reliefs initially introduced by the legislature under Act 829 to reduce the impact of COVID-19. Section 38C(3) was *gazetted* to provide a temporary relief to matters relating to housing construction wherein vacant possession was due to be delivered in the year 2021. Therefore, s 38C(3) ought to be interpreted with special emphasis placed on the retrospective application of the exemption, and the mischief of protecting the developer in the

specific context of delivery of vacant possession. The court opined that a strict reading of s 38C(3) as advocated by the applicants was misconceived for the obvious reason that such reading defeated every purpose for which s 38C(1) of Act A1641 was introduced (see paras 31 & 33–35).

(3) Section 38C(1) of Act A1641 provided exemption for the period from 1 January 2021 to 31 December 2021 but Act A1641 only came into effect on 13 January 2022. The applicants suggested that a literal interpretation ought to be given by the first respondent in respect of interpreting provisions of s 38 of Act 829. However, the provision would then be rendered illusory to the third respondent as it was impossible for the third respondent to have made the application prior to its *gazettement* despite suffering hindrances in delivering vacant possession throughout 2021. Given the above, the court opined that the first respondent acted rationally and within the ambit of powers conferred upon him when interpreting the provisions of s 38C(1) and (3) of Act A1641 with the purpose underlined in the preamble of Act 829, notwithstanding the expiration of vacant possession period, ie to provide temporary relief to reduce the impact of Movement Control Orders and Recovery Phases during the COVID-19 pandemic throughout year 2021 (see paras 36–38 & 41).

(4) The Federal Court in the case of *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 ('Ang Ming Lee'), held that: (a) generally, a minister need not sign a letter personally; (b) what was crucial were whether the decision conveyed in the letter was made by the minister and whether the letter was in fact signed by the officer on behalf of the minister; and (c) the minister may explain by affidavit whether he had in fact made the decision conveyed in a letter signed by his officer, and the officer was conveying the decision on his behalf. In the present case, the court found that the contents of the said letter itself clearly mentioned that the third exemption was a decision by the first respondent and the second respondent was only instructed to convey the said decision on behalf of the first respondent (see paras 44 & 50).

(5) On the third issue, the court found that it was raised in Parliament with specifically mention of the case of Ang Ming Lee. The minister in his reply had distinguished the decision in Ang Ming Lee, on the ground that the measure introduced under Act 829 and Act A1641 was an exemption and not an extension of time. The minister explained that an exemption brought about the effect of 'suspending time' or 'freezing time' which was conceptually different from an extension of time. In effect, it was safe to surmise that Parliament had deliberately chosen not to accord a right to be heard to the purchasers or there was no requirement for obtaining the

consent of the purchasers for purposes of the exemptions. The court opined that the decision of Parliament was reasonable and had a rational basis in that Parliament had considered that the minister would be inundated with applications and letters from developers and purchasers alike. Given the limited time for the minister to consider and to make a decision, coupled with the continuing in force of movement control order at the material time, it was simply impracticable for the minister to hear all the purchasers before making a decision (see paras 52–55).

(6) The Court of Appeal in the case of *Bludream City Development Sdn Bhd v Kong Thye & Ors and other appeals* [2022] 2 MLJ 241 ('Bludream') had in detailed judgment iterated the considerations a minister would need to consider in making a decision in regards to an EOT involving housing laws. Based on Bludream, it could be summarised as followed: (a) there was no express requirement of a right to be heard that must be given to the purchasers; (b) what was important was that the minister must act fairly, taking into consideration that the purchasers were not obliged to consent to any extension of time implored by the developer; and (c) the minister was entitled to proceed on the assumption that the purchasers would not agree to any extension of time. In the present case, the court found that those considerations and competing interests mentioned in the Bludream were in fact brought to the attention of the minister and the minister had in fact considered the competing considerations before making a decision (see paras 57–59).

(7) It ought to be noted that s 38C of Act A1641 was an extension of s 35(1), (2) and (3) of Act 829 to cover the period of 2021. The court found that the applicants accepted the constitutionality of the first and second exemption for the period of 2020. However, the applicants failed to explain why s 38C of Act A1641 which covered the later period of 2021 was unconstitutional while the constitutionality of the previous period in 2020 was not disputed. Further, the court found that all the relevant provisions found in Act 829 and Act A1641 represented a legislative response and compromise for otherwise a force majeure incident. To contend that s 38C of Act A1641 was unconstitutional was to disturb the compromise and balancing provisions variously found in ss 38B, 38D and 38E of Act A1641 which a purchaser stood to benefit from. Finally, the court opined that the temporary reliefs under Act 829 could not be viewed as a permanent intrusion into permanent rights guaranteed under the Federal Constitution (see paras 65, 67 & 69–70).

(8) Premised on the aforesaid reasons, the court opined that: (a) the exemption dated 26 April 2022 was not tainted with illegality, irrationality and procedural impropriety; (b) the communication of the first respondent's decision by the second respondent was not illegal and in excess of the second respondent's powers and authority; and (c) the

provisions of s 38C of Act A1641 was a temporary relief and was proportional to both parties, thus did not qualify to be ultra vires of the articles of the Federal Constitution (see para 74).

[Bahasa Malaysia summary

Dalam kes semasa, pemohon-pemohon adalah pembeli-pembeli petak strata di sebuah pembangunan kediaman yang dikenali sebagai Senada Kiara, responden pertama adalah menteri yang bertanggungjawab dalam hal-hal berkaitan pembangunan perumahan, responden kedua ialah ketua pengarah Jabatan Perumahan Negara dan yang terakhir responden ketiga ialah pemaju bagi Senada Kiara. Pemohon-pemohon memfailkan permohonan semakan kehakiman semasa menurut A 53 Kaedah-Kaedah Mahkamah 2012 untuk mendapatkan perintah certiorari untuk membatalkan keputusan responden pertama dalam memberikan pemaju pengecualian ketiga selama 214 hari bagi tempoh dari 1 Januari 2021 hingga 31 Disember 2021 di bawah s 38C Akta Langkah-Langkah Sementara bagi Mengurangkan Kesan Penyakit Koronavirus 2019 (COVID-19) (Pindaan) 2022 ('Akta A1641') di mana 214 hari dalam tempoh tersebut akan dikecualikan dalam pengiraan tempoh masa untuk penyerahan milikan kosong dan penyiapan kemudahan bersama. Pemohon-pemohon berhujah bahawa: (a) telah berlaku pelanggaran s 38C Akta A1641 di mana peruntukan tersebut tidak memberi hak kepada responden pertama untuk mempertimbangkan permohonan oleh responden ketiga selepas tamat tempoh untuk menyerahkan milikan kosong ('isu pertama'); (b) responden kedua tidak mempunyai kuasa untuk menandatangani mana-mana surat yang memberikan lanjutan masa ('EOT') di bawah Akta A1641 dan Akta Pemajuan Perumahan (Kawalan dan Pelesenan) 1966 ('isu kedua'); (c) EOT yang diberikan oleh responden pertama melalui surat bertarikh 26 April 2022 ('surat tersebut') yang ditandatangani oleh responden kedua dilakukan tanpa persetujuan pemohon, tanpa pemohon diberi hak untuk didengar dan tanpa mengambil kira pertimbangan-pertimbangan yang berkaitan ('isu ketiga'); dan (d) s 38C Akta A1641 adalah tidak berperlembagaan ('isu keempat').

Diputuskan, menolak permohonan pemohon-pemohon untuk semakan kehakiman dengan kos RM2,500 tanpa alokator yang perlu dibayar oleh pemohon-pemohon kepada responden pertama dan kedua dan kos RM2,500 tertakluk kepada alokator yang perlu dibayar oleh pemohon-pemohon kepada responden ketiga:

(1) Tujuan sebenar larangan yang terdapat dalam s 38C(3) Akta A1641 adalah berkaitan dengan kelewatan dalam menyerahkan milikan kosong bagi perjanjian jual beli ('PJB') yang tamat sebelum 18 Mac 2020 atau yang tiada kaitan dengan atau tidak disebabkan oleh pelbagai sekatan yang dikenakan sebagai sebahagian daripada langkah untuk membendung penyebaran virus tersebut. Seksyen 38C(3) tidak terpakai

kepada situasi di mana tempoh pembinaan telah dikecualikan di bawah s 35(1), (2) dan (3) Akta Langkah-Langkah Sementara bagi Mengurangkan Kesan Penyakit Koronavirus 2019 (COVID-19) 2020 ('Akta 829') menurut pengecualian pertama dan kedua. Dalam situasi di mana pengecualian pertama dan/atau kedua terpakai, tempoh pembinaan tidak lagi mengikut tempoh pembinaan yang asal seperti yang ditetapkan dalam PJB. Dalam kes semasa, memandangkan pemohon-pemohon menerima keabsahan pengecualian pertama dan kedua, tidak ada persoalan mengenai apa-apa kelewatan dalam kemajuan pembinaan, melainkan disebabkan oleh sekatan pergerakan COVID-19 yang telah dilaksanakan mulai 18 Mac 2020. Oleh itu, larangan dalam s 38C(3) Akta A1641 tidak terpakai kepada responden ketiga (lihat perenggan 22, 25, 27 & 29).

(2) Seksyen 38C(3) Akta A1641 adalah lanjutan daripada relif-relif sementara yang pada mulanya diperkenalkan oleh badan perundangan di bawah Akta 829 untuk mengurangkan kesan COVID-19. Seksyen 38C(3) telah diwartakan untuk memberikan relif-relif sementara kepada perkara-perkara yang berkaitan dengan pembinaan perumahan di mana milikan kosong akan diserahkan pada tahun 2021. Oleh itu, s 38C(3) sepatutnya ditafsirkan dengan penekanan khusus yang diberikan pada pemakaian retrospektif pengecualian tersebut, dan kesukaran melindungi pemaju dalam konteks spesifik penyerahan milikan kosong. Mahkamah berpendapat bahawa pembacaan yang sebenarnya ke atas s 38C(3) seperti yang dianjurkan oleh pemohon-pemohon adalah suatu salah anggap atas sebab yang jelas bahawa pembacaan sedemikian akan menafikan setiap tujuan bagi penggubalan s 38C(1) Akta A1641 (lihat perenggan 31 & 33–35).

(3) Seksyen 38C(1) Akta A1641 memperuntukkan pengecualian bagi tempoh dari 1 Januari 2021 hingga 31 Disember 2021 tetapi Akta A1641 hanya berkuat kuasa pada 13 Januari 2022. Pemohon mencadangkan bahawa tafsiran literal hendaklah diberikan oleh responden pertama berkenaan dengan tafsiran peruntukan s 38 Akta 829. Walau bagaimanapun, peruntukan tersebut kemudiannya akan menjadi sia-sia kepada responden ketiga kerana adalah mustahil untuk responden ketiga membuat permohonan sebelum pewartaan Akta tersebut walaupun mengalami halangan dalam menyerahkan milikan kosong sepanjang tahun 2021. Memandangkan perkara di atas, mahkamah berpendapat bahawa responden pertama bertindak secara rasional dan dalam lingkungan kuasa yang diberikan kepadanya apabila mentafsirkan peruntukan s 38C(1) dan (3) Akta A1641 dengan tujuan yang digariskan dalam mukadimah Akta 829, walaupun tempoh pemilikan kosong telah tamat, iaitu untuk memberikan relif sementara bagi mengurangkan kesan Perintah Kawalan Pergerakan dan Fasa

Pemulihan semasa pandemik COVID-19 sepanjang tahun 2021 (lihat perenggan 36–38 & 41).

(4) Mahkamah Persekutuan dalam kes *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281 ('Ang Ming Lee'), memutuskan bahawa: (a) secara amnya, seorang menteri tidak perlu menandatangani surat secara peribadi; (b) apa yang penting ialah sama ada keputusan yang disampaikan dalam surat tersebut dibuat oleh menteri dan sama ada surat tersebut sebenarnya ditandatangani oleh pegawai bagi pihak menteri; dan (c) menteri boleh menjelaskan melalui afidavit sama ada dia sebenarnya telah membuat keputusan yang disampaikan dalam surat yang ditandatangani oleh pegawainya, dan pegawai tersebut menyampaikan keputusan tersebut bagi pihaknya. Dalam kes semasa, mahkamah mendapati bahawa kandungan surat tersebut sendiri dengan jelas menyebut bahawa pengecualian ketiga tersebut adalah keputusan responden pertama dan responden kedua hanya diarahkan untuk menyampaikan keputusan tersebut bagi pihak responden pertama (lihat perenggan 44 & 50).

(5) Mengenai isu ketiga, mahkamah mendapati ia telah dibangkitkan di Parlimen dengan menyebut secara khusus kes Ang Ming Lee. Menteri dalam jawapannya telah membezakan keputusan dalam Ang Ming Lee, atas alasan bahawa langkah yang diperkenalkan di bawah Akta 829 dan Akta A1641 adalah pengecualian dan bukan lanjutan masa. Menteri menjelaskan bahawa pengecualian membawa kesan 'suspending time' atau 'freezing time' yang secara konsepnya berbeza daripada lanjutan masa. Dengan itu, adalah selamat untuk menganggap bahawa Parlimen sengaja memilih untuk tidak memberikan hak untuk didengar kepada pembeli-pembeli atau tidak ada keperluan untuk mendapatkan persetujuan pembeli-pembeli bagi tujuan pengecualian. Mahkamah berpendapat bahawa keputusan Parlimen tersebut adalah munasabah dan mempunyai asas yang rasional kerana Parlimen telah mempertimbangkan bahawa menteri akan dibanjiri dengan permohonan dan surat daripada pemaju-pemaju dan pembeli-pembeli. Mengambil kira masa yang terhad untuk menteri mempertimbangkan dan membuat keputusan, ditambah pula dengan perintah kawalan pergerakan yang berterusan pada masa yang material, adalah tidak praktikal bagi menteri untuk mendengar semua pembeli sebelum membuat keputusan (lihat perenggan 52–55).

(6) Mahkamah Rayuan dalam kes *Bludream City Development Sdn Bhd v Kong Thye & Ors and other appeals* [2022] 2 MLJ 241 ('Bludream') dalam suatu penghakiman yang terperinci telah mengulangi berkenaan perkara-perkara yang perlu dipertimbangkan oleh seorang menteri dalam membuat keputusan berhubung EOT yang melibatkan

undang-undang perumahan. Berdasarkan Bludream, ia boleh diringkaskan seperti berikut: (a) tiada keperluan nyata berkenaan hak untuk didengar yang perlu diberikan kepada pembeli-pembeli; (b) apa yang penting ialah menteri perlulah bertindak adil, dengan mengambil kira bahawa pembeli-pembeli tidak diwajibkan untuk memberi kebenaran kepada apa-apa lanjutan masa yang dipohon oleh pemaju; dan (c) menteri berhak meneruskan dengan andaian bahawa pembeli-pembeli tidak akan bersetuju dengan apa-apa lanjutan masa. Dalam kes semasa, mahkamah mendapati bahawa pertimbangan dan kepentingan bersaing yang disebut dalam Bludream sebenarnya telah dibawa ke perhatian menteri dan menteri sebenarnya telah mempertimbangkan pertimbangan bersaing tersebut sebelum membuat keputusan (lihat perenggan 57–59).

(7) Perlu diambil perhatian bahawa s 38C Akta A1641 adalah lanjutan daripada s 35(1), (2) dan (3) Akta 829 untuk meliputi tempoh tahun 2021. Mahkamah mendapati bahawa pemohon-pemohon telah menerima keperlembagaan pengecualian pertama dan kedua bagi tempoh 2020. Walau bagaimanapun, pemohon-pemohon gagal menjelaskan mengapa s 38C Akta A1641 yang meliputi tempoh 2021 yang terkemudian adalah tidak berperlembagaan manakala keperlembagaan tempoh sebelumnya pada 2020 tidak dipertikaikan. Selanjutnya, mahkamah mendapati bahawa semua peruntukan berkaitan yang terdapat dalam Akta 829 dan Akta A1641 mewakili tindak balas perundangan dan kompromi bagi mengelakkan kejadian force majeure. Penghujahan bahawa s 38C Akta A1641 adalah tidak berperlembagaan adalah bersamaan dengan mengganggu kompromi dan peruntukan-peruntukan yang mengimbang yang banyak didapati dalam ss 38B, 38D dan 38E Akta A1641 yang memberikan manfaat kepada pembeli-pembeli. Akhir sekali, mahkamah berpendapat bahawa relif-relif sementara di bawah Akta 829 tidak boleh dilihat sebagai pencerobohan kekal terhadap hak kekal yang dijamin di bawah Perlembagaan Persekutuan (lihat perenggan 65, 67 & 69–70).

(8) Berdasarkan alasan-alasan yang dinyatakan di atas, mahkamah berpendapat bahawa: (a) pengecualian bertarikh 26 April 2022 tidak dicemari dengan kepenyalahan undang-undang, ketidakrasionalan dan ketidakwajaran prosedur; (b) komunikasi keputusan responden pertama oleh responden kedua adalah tidak menyalahi undang-undang dan tidak melebihi kuasa dan wibawa responden kedua; dan (c) peruntukan s 38C Akta A1641 adalah relif sementara dan berkadar kepada kedua-dua pihak, oleh itu ia tidak ultra vires perkara-perkara dalam Perlembagaan Persekutuan (lihat perenggan 74).]

Cases referred to

Airspace Management Services Sdn Bhd v Col (B) Harbans Singh a/l Chingar Singh [2000] 3 MLJ 714; [2000] 1 MLRA 664; [2000] 4 CLJ 77, CA (refd)

Alam Venture Sdn Bhd & Anor v Abdul Aziz bin Abdul Majid & Ors [2015] 4 MLJ 270; [2015] 5 CLJ 1; [2015] 4 MLRA 371, FC (refd)

Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281; [2019] 6 MLRA 494; [2020] 1 CLJ 162; [2019] 8 AMR 297, FC (folld)

Bludream City Development Sdn Bhd v Kong Thye & Ors and other appeals [2022] 2 MLJ 241; [2022] 3 MLRA 257; [2022] 2 CLJ 829, CA (folld)

Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288; [2003] 4 CLJ 625; [2003] 2 MLRA 114, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 5 MLRA 696; [2010] 8 CLJ 629; [2011] 3 AMR 38, FC (refd)

Saravanan a/l Sangaralingam & Ors v Pengawal Perumahan & Ors [2022] MLJU 2573; [2022] 1 CLJU 2434, HC (folld)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 1 MLRA 268; [1995] 2 CLJ 748; [1995] 2 AMR 1601, CA (refd)

Legislation referred to

Contracts Act 1950 s 57(2)

Federal Constitution arts 13, 13(1), (2)

Housing Development (Control and Licensing) Act 1966

Housing Development (Control and Licensing) Regulations 1989 reg 11(1), 12

Rules of Court 2012 O 53

Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ss 35, 35(1), (2), (3), 38, 38A(a), 38B, 38C, 38C(1), (3)

Harneshpal Singh (Lui & Bhullar) for the applicant.

Liew Horng Bin (Attorney General's Chambers) for the first and second respondents.

K Rajasegaran (Kalvinder Singh with him) (Prietam Singh, Nor & Co) for the third respondent.

Ahmad Kamal J:

INTRODUCTION

[1] The applicants filed an application for judicial review (encl 10) under O 53 of the Rules of Court 2012 ('the ROC').

[2] Leave was granted to the applicants for application for judicial review

against the respondents to seek the following reliefs:

(1) Satu perintah certiorari bagi membatalkan kelulusan Menteri Perumahan dan Kerajaan Tempatan melalui surat bertarikh 26.4.2022 yang ditandatangani oleh Dato' N Jayaselan yang mengecualikan tempoh selama 214 hari bagi pengiraan masa serahan milikan kosong dan penyiapan kemudahan bersama Perjanjian Jual Beli yang ditandatangani oleh Pembeli-Pembeli projek pemajuan perumahan Senada Kiara dengan pemaju, Sime Darby Brunfield Resort Sdn Bhd;

(2) Satu deklarasi bahawa kelulusan Menteri Perumahan dan Kerajaan Tempatan melalui surat bertarikh 26.4.2022 yang ditandatangani oleh Dato' N Jayaselan yang mengecualikan tempoh selama 214 hari bagi pengiraan masa serahan milikan kosong dan penyiapan kemudahan bersama Penjanjian Jual Beli yang ditandatangani oleh Pembeli-Pembeli projek pemajuan perumahan Senada Kiara dengan pemaju, Sime Darby Brunsfield Resort Sdn Bhd, adalah tidak sah dan melampaui bidangkuasa yang diperuntukkan di bawah Akta Langkah-Langkah Sementara Bagi Mengurangkan Kesan Penyakit Koronavirus 2019 (COVID-19), 2020 (Akta 829).

(3) Satu deklarasi bahawa Seksyen 38C Akta Langkah-Langkah Sementara Bagi Mengurangkan Kesan Penyakit Koronavirus 2019 (COVID-19), 2020 (Akta 829) adalah ultra vires Perlembagaan Persekutuan;

(4) Kos permohonan ini; dan

(5) Lain-lain perintah atau relif yang difikirkan sesuai dan adil oleh Mahkamah Mulia ini.

[3] In essence, this application for judicial review seeks, among others reliefs, an order of certiorari to quash the decision of the Minister ('first respondent') in granting the Sime Darby Brunsfield Resort Sdn Bhd ('developer') ('third respondent') the third exemption of 214 days for the period from 1 January 2021 to 31 December 2021 under s 38C of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) (Amendment) Act 2022 ('Act A1641') wherein the said 214 days in that period would be excluded in the calculation of the time period for delivery of vacant possession and completion of common facilities.

[4] After the hearing, I dismissed the applicants' judicial review application (encl 10). The grounds for my decision appear below.

BACKGROUND FACTS

[5] The background facts gathered from the cause papers and submissions by the parties are largely undisputed and can be summarized as follows:

(a) the applicants are purchasers of strata parcels in a residential

development known as 'Senada Kiara';

(b) the first respondent is the Minister in charge of matters concerning housing developments in the Housing Development (Control and Licensing) Act 1966 ('the HDA') and the Regulations whereas the second respondent is the Ketua Pengarah of the Jabatan Perumahan Negara in the Ministry of Housing and Local Government (Ministry of Local Government Development);

(c) the third respondent is the developer of Senada Kiara. It is a licensed housing developer under the HDA;

(d) the third respondent entered into various sale and purchase agreements (SPA(s)) to sell units in Senada Kiara. The applicants are purchasers who have entered into SPAs with the third respondent;

(e) the SPAs are agreements executed pursuant to Schedule H read with reg 11(1) of the Housing Development (Control and Licensing) Regulations 1989 ('the HDR');

(f) cll 25(1) and 29(1) of the SPAs provide for a time period of 48 months to deliver vacant possession and complete the common facilities.

(g) there were three EOTs pertaining to Senada Kiara, however, the first two EOTs providing a total of 289 days of exclusion (from 18 March 2020 until 31 August 2020 and 1 September 2020 to 31 December 2020) do not form part of the subject matter in this underlying judicial review application;

(h) the EOT granted and which forms part of the subject matter in this judicial review application is the EOT granted by the first respondent pursuant to s 38C of Act A1641 by way of a letter dated 26 April 2022 signed by the second respondent excluding a period of 214 days from the calculation of vacant possession and completion of common facilities at Senada Kiara;

(i) the new s 38C(1) allows a developer to apply to the Minister to exclude any period from 1 January 2021 to 31 December 2021 from the calculation of the time for delivery of vacant possession of a housing accommodation or completion of the common facilities in a housing development;

(j) being dissatisfied with the said decision, the applicants filed the application for judicial review for the following reliefs:

(i) certiorari to quash the EOT granted by the first respondent by way of a letter dated 26 April 2022 signed by the second respondent excluding a period of 214 days;

(ii) a declaration that the EOT granted by the first respondent by way

of a letter dated 26 April 2022 signed by the second respondent is invalid and ultra vires the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ('Act 829'); and

(iii) a declaration that s 38C of Act A1641 is ultra vires the Federal Constitution ('the FC').

THE GROUNDS FOR JUDICIAL REVIEW

[6] Based on the statement, the applicants seek to challenge the first and second respondents decision based on the following grounds:

(a) there has been a breach of s 38C of Act A1641 wherein the said provision does not give the right to the first respondent to consider an application by the third respondent after the expiry of the period to deliver vacant possession;

(b) the first respondent has no power to sign any letters granting EOTs under Act A1641 and HDA;

(c) the EOT granted by the first respondent by way of a letter dated 26 April 2022 signed by the second respondent was done without the consent of the applicants, without the applicants being given a right to be heard and without taking into account relevant considerations;

(d) the EOT was granted under s 38C of Act A1641 by which Parliament purported to rewrite the SPAs and deprive the applicants of their vested right to liquidated ascertained damages ('LAD') statutorily prescribed by the HDR. The said provision is thus unconstitutional as it infringes art 13 of the FC as follows:

(i) it does not fulfill the requirements of a valid law as required by art 13(1) of the FC; and

(ii) in any event, it does not provide for adequate compensation under art 13(2) of the FC.

THE LAW

[7] Judicial review is generally concerned with the decision-making process where the impugned decision is flawed on the ground of procedural impropriety.

[8] However, the law has now developed to allow a decision to be challenged on grounds of illegality and irrationality, which then permits the courts to scrutinise the decision not only for the process, but also for substance.

[9] However, the Federal Court in subsequent decisions held that not every case is amenable to such approach and merits can only be scrutinised in the most appropriate of cases. This can be seen as follows:

(a) *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625; [2003] 2 MLRA 114:

> [12] Quite clearly, the views expressed by the majority in *Rama Chandran* are not the product of what some legal commentators described as 'judicial excessivism'. *On the contrary, they reflect the kind of controlled judicial activism that is needed in order to meet, in a supervisory context, the ever-widening powers conferred upon statutory tribunals or other bodies which have proliferated, in modern times and affecting, quite conceivably, all facets of society. I say 'controlled' because I take the view that Rama Chandran powers should only be invoked in appropriate cases. Otherwise, there is the danger of inculcating what a learned writer has aptly described as a 'runaway development of judicial review'.* (See Dr Venkatiyer: The Importance of Judicial Review, Insaf, Vol xxxi No 4, p 60. In drawing attention to the Indian experience, he says this:
>
> > *India stands out as a prime example of this unfortunate development. There, the courts, have assumed competence over an amazing array of public activity: they have given directions as to the width of a road giving access to a building.* (*Upendra Baxi v. State of Uttar Pradesh* [1986] 4 SCC 106); *asked a State to pass legislation to prevent ragging of college students*, (*State of Himachal Pradesh v. A Parent of a student of Medical College, Simla* [1985] 3 SCC); *revoked the limit that had been put on the expenditure on drugs in a mental hospital*, (*Rakesh Chand Narain v. State of Bihar* [1986] Supp. 576); *laid down guidelines for inter-country adoption of children*, (*Laxmi Kant Panday v. Union of India AIR* [1987] SC 232); *prescribed the qualifications for drivers of buses belonging to or hired by educational institutions*, (*MC Mehta v. Union of India* [1998] IX AD (SC) 37); *sad so on.*
>
> [13] According to him, the Indian practice has been the subject of criticism because the courts would have encroached upon the sphere allotted to the legislature by making populist declarations of rights — rights which Parliament, in its wisdom, chose not to legislate upon.
>
> [14] *Clearly therefore, not every case is amenable to the Rama Chandran approach. It depends on the factual matrix and/or the legal modalities of the case. This is certainly a matter of judicial discretion on the part of the reviewing judge*. In the instant case, notwithstanding the very able submission by Dato' Dr Cyrus Das, I remain unconvinced that a case has been made out for revisiting *Rama Chandran* in terms of his propositions. That being the case, the answer to the question postulated for our consideration has to be in the affirmative. (Emphasis added).

(b) *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1[2010] 5 MLRA 696[2010] 8 CLJ 629[2011] 3 AMR 38:

> [16] The *Rama Chandran* decision has been regarded or interpreted as giving the reviewing court a license to review without restrain decisions for

substance even when the said decision is based on finding of facts. However, post *Rama Chandran* cases have applied some brakes to the court's liberal approach in *Rama Chandran*. The Federal Court in the case of *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 after affirming the *Rama Chandran* decision held that *there may be cases in which for reason of public policy, national interest, public safety or national security the principle in Rama Chandran may be wholly inappropriate*.

[17] The Federal Court, in *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625; [2003] 2 MLRA 114, again held that *the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the Rama Chandran approach*. Further, it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plan irrationality, even where the reviewing judge might not have come to the same conclusion. (Emphasis added.)

(c) *Alam Venture Sdn Bhd & Anor v Abdul Aziz bin Abdul Majid & Ors* [2015] 4 MLJ 270; [2015] 5 CLJ 1; [2015] 4 MLRA 371:

It is now settled law that the courts may review the decision of an inferior tribunal on the grounds of illegality, irrationality and possibly proportionality: *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147, thus permitting the courts to scrutinise the decision not only for process but also for substance. In *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625; [2003] 2 MLRA 114 *this court however clarified that not every case was amenable to judicial review pursuant to the principle in R Rama Chandran's case. It should only be invoked in appropriate cases. There may be cases in which for reasons of public policy, national interest, public safety or national security it may be wholly inappropriate for the courts to attempt any substitution of views*: *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11. (Emphasis added.)

[10] It is settled law that the High Court will not interfere with a decision of the first and second respondents unless it can be established that the decision is infected with errors of law.

[11] The meaning of error of law has also been explained by the Court of Appeal in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 1 MLRA 268; [1995] 2 CLJ 748; [1995] 2 AMR 1601 in the following words:

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. *But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations* (what may be conveniently termed an Anisminic error) or *if*

A *he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.* (Emphasis added.)

[12] Similarly, in the case of *Airspace Management Services Sdn Bhd v Col (B) Harbans Singh a/l Chingar Singh* [2000] 3 MLJ 714; [2000] 1 MLRA 664; [2000] 4 CLJ 77, the Court of Appeal held that an erroneous inference of facts is also an error of law which would warrant an order of certiorari:

B

> On the other hand, we accept, of course, that it is entirely competent for the High Court in certiorari proceedings to disagree with the Industrial Court on the conclusions or inferences drawn by the latter from the proved or admitted evidence on the ground that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion or drawn such an inference. *An erroneous inference from proved or admitted facts is an error of law; not an error of fact*. (Emphasis added).

C

D **[13]** Based on the foregoing passages, it is my view that to succeed in an application for judicial review, the applicants must show that the first and second respondents had, among others:

(a) asked itself the wrong questions;

E (b) considered irrelevant matters;

(c) failed to consider relevant matters;

(d) failed to apply the proper principle(s) of law; and/or

F (e) reached a decision that was so perverse that no reasonable tribunal under similar circumstances would have reached it.

THE DECISION OF THE COURT

G *There has been a breach of s 38c of Act A1641 wherein the said provision does not give the right to the first respondent to consider an application by the third respondent after the expiry of the period to deliver vacant possession*

[14] The applicants submit that there has been a breach of s 38C of Act H A1641 wherein the said provision does not give the right to the first respondent to consider an application by the third respondent after the expiry of the period to deliver vacant possession.

[15] Section 38C of Act A1641 states as follows:

I

> (1) *In relation to a housing development, notwithstanding any agreement entered into between a developer and a purchaser, the developer may apply to the Minister for any period from 1 January 2021 to 31 December 2021 to be excluded from the calculation of the time for delivery of vacant possession of a housing accommodation or completion of common facilities, as the case may be in the housing development.*

(2) Upon considering the application under subsection (1), the Minister may exclude any period from 1 January 2021 to 31 December 2021 from the calculation of time for delivery of vacant possession of a housing accommodation or completion of common facilities it the Minister is satisfied that due to measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 to control or prevent the spread of COVID-19, the developer was unable to deliver vacant possession of a housing accommodation or complete the common facilities in accordance with the agreement.

(3) *The Minister shall not consider an application under subsection (1) if the application is made after the expiry of the time for delivery of vacant possession or the completion of common facilities specified under the agreement.*

(4) Subsection (1) applies only to a developer of a housing development for which its first agreement was entered into before 31 May 2021.

(5) For the purposes of assessing the liquidated damages due to the failure of the developer to deliver vacant possession of a housing accommodation or complete the common facilities, the period excluded by the Minister under subsection (2) shall not be taken into account. (Emphasis added).

[16] The applicants relied on a literal interpretation of s 38C(3) and contend that the first respondent cannot consider the application made after the expiry of the time for delivery of vacant possession specified under the agreement since the words 'shall not consider' in s 38C(3) is mandatory and admits no exception.

[17] In short, accepting the validity of the first exemption (167 days) and second exemption (122 days) allowed by the first respondent under ss 35(1), 35(2) and 35(3) of Act 829, the applicants contended that the last date to deliver vacant possession falls on 12 September 2020 (based on a 36 months completion date of the first SPA dated 28 November 2016). On that basis, it was contended that the developer's application for the third exemption under s 38C(1) of Act A1641 which was made on 16 February 2022 was made out of time and when vacant possession already fell due on 12 September 2020 (based on a 36 months completion period), or on 12 September 2021 (based on a 48 months completion period).

[18] It is to be noted that the introduction of Act 829 was effected retrospectively and subsequent amendments under Act 1641 were introduced to reduce the lasting unprecedented effects of the COVID-19 global pandemic, which caused respective MCO and recovery measures to be affected throughout the year 2020–2021.

[19] It was further recognised vide *Pertanyaan Parlimen Keempat Belas Penggal Keempat, Mesyuarat Pertama dated 30 September 2021* that the MCOs' and subsequent recovery phase(s) had lost the construction industry a

collective sum of RM42 billion, reproduced as follows:

> Sepanjang tempoh pelaksanaan PKP bermula daripada 18 Mac 2020 sehingga kini, industri pembinaan dianggarkan mengalami kerugian sebanyak RM42 bilion. *Daripada jumlah ini, RM18 bilion adalah anggaran kerugian dalam tempoh PKP 3.0 yang bermula pada 1 Jun 2021 sehingga September 2021. Sementara bakinya RM24 bilion merupakan kerugian daripada pelaksanaan PKP 1.0 pada 2020, yang menjejaskan pelaksanaan kerja pembinaan daripada Mac hingga Julai 2020.*
>
> Sememangnya sektor pembinaan adalah di antara industri yang terkesan akibat penularan pandemik COVID-19. KKR bersama-sama dengan agensi di bawahnya termasuk Jabatan Kerja Raya dan Lembaga Pembangunan Industri Pembinaan ('CIDB') serta agensi pelaksanaan berkaitan telah mengadakan beberapa sesi libat urus bersama pemain-pemain industri bagi mendepani cabaran-cabaran yang timbul serta mencari penyelesaian terhadap cabaran tersebut. Antara cabaran yang dihadapi oleh sector pembinaan adalah seperti berikut:
>
> i) kenaikan kos bahan binaan;
>
> ii) kenaikan kos upah pekerja terutamanya pekerja am akibat kekurangan tenaga kerja disebabkan oleh:
>
> (a) keperluan untuk pekerja binaan dapat vaksinasi lengkap; dan
>
> (b) pekerja binaan yang kebanyakan terdiri daripada pekerja asing yang pulang ke negara asal dan tidak dapat kembali ke sini;
>
> iii) kos Program Rekalibrasi Tenaga Kerja yang terpaksa ditanggung oleh kontraktor serta pengenaan syarat ketat bagi mendapatkan kelulusan;
>
> iv) penambahan kos kepada majikan bagi menyediakan penginapan pekerja binaan untuk memenuhi syarat Akta 446;
>
> v) kos pemantauan tatacara operasi standard ataupun SOP yang perlu ditanggung sepenuhnya oleh kontraktor; dan
>
> vi) keperluan untuk mewujudkan universal tempoh lanjutan masa ataupun EOT ke dalam Akta 829. (Emphasis added.)

[20] It is also in consonant with the first and second respondents averment and reference to the *Penyata Rasmi Parlimen Dewan Negara dated 16 December 2021* wherein it was addressed:

> Akta 829 merupakan komitmen kerajaan untuk mengurangkan impak perundangan COVID-19 dan juga merupakan satu temporary relief daripada tanggungjawab perjanjian bagi suatu tempoh yang ditetapkan. Penggubalan akta ini melibatkan pengubahsuaian 14 akta dan dua ordinan di peringkat Persekutuan di bawah kawal selia kementerian atau jabatan berkaitan. Keputusan kerajaan pada tahun 2020 berkaitan penggubalan akta ini didorong oleh krisis penularan pandemik COVID-19 yang bukan sahaja memberi impak negative kepada kesihatan awam tetapi turut memberi kesan kepada ekonomi dan sosial penduduk dunia termasuklan rakyat negara kita.

> Dalam konteks ini, kesan penularan COVID-19 dirasai oleh semua pihak apabila suatu pihak terkesan bermakna seluruh rantaian ekonomi (economic chain) dengan izin akan turut terkesan *termasuk akibat daripada pelaksanaan pelbagai Perintah Kawalan Pengerakan* (*PKP*) dan Pelan Pemulihan Negara Berfasa. (Emphasis added.)

[21] The actual intendment of s 38C(3) of Act A1641 was elaborately explained by the second respondent in his affidavit (see: para 31, encl 22). The second respondent was the DG of the Housing Department who had led the amendment exercise which brought about Act A1641.

[22] In short, a delay in handing vacant possession for SPA expiring before 18 March 2020 or which has nothing to do with or was not caused by the various restrictions imposed as part of the measures to curb the spread of the virus is the real or actual purpose of the prohibition found in s 38C(3) of Act A1641.

[23] The explanation given by the Minister in Parliament further lends support to this proposition (see: Hansard, dated 16 December 2021 on p 51);

> Pindaan Akta 829 ini hanya untuk projek yang aktif dalam pembinaan sahaja dan tidak melewati *tempoh pembinaan yang asal*. Oleh itu, *projek sakit* dan *terbengkalai tidak akan dipertimbangkan*. (Emphasis added.)

[24] It is to be noted that the words 'melewati tempoh pembinaan yang asal' quoted by the Minister in Parliament corresponds to the words 'time ... specified under the agreement' as can be seen in s 38C(3) of Act A1641. The original completion date (asal) is as stated in the 'agreement'. Section 38A(a) of Act A1641 defines 'agreement' as a Schedule Agreement stipulated in the Housing Regulations 1989.

[25] Thus, I am of the view that s 38C(3) of Act A1641 does not apply to a situation where the completion period has been exempted under ss 35(1), 35(2) and 35(3) of Act 829 pursuant to the first and second exemption. In situations where the first and/or second exemption applies, the completion period no longer follows the original completion period (*tempoh pembinaan yang asal*) as stipulated in the SPA.

[26] This is consistent with a reading that s 38C(3) of Act A1641 only seeks to prohibit a Schedule SPA that has expired before the commencement of COVID-19, and in this case, before the statutorily defined date of 18 March 2020 (where a total lockdown was imposed). This is the only instance where the 'tempoh pembinaan yang asal' as stipulated in the SPA has expired.

[27] In the instant case, since the applicants accepted the validity of the

first and second exemption, there could be no question of any delay in the construction progress, but for the COVID-19 lockdown which was implemented beginning 18 March 2020.

[28] Added to that, the applicants conceded to the second exemption, which was premised on the presumed fact that the construction progressed promptly following the scheduled development, but was delayed as a direct result of COVID-19. There was no express pleaded challenge by the applicants on the first and second exemption.

[29] Given the above, I am of the view that based on the facts of the present case, there could be no complaint that the construction was behind schedule for more than 30% of the scheduled progress (as per the definition of a 'sick project' by the Ministry) before the start of COVID-19, or that the completion period has expired before 18 March 2020, in that the project neither fall under the category of a 'sick project' nor an abandoned project, the prohibition in s 38C(3) of Act A1641 does not apply to the third respondent in the present case.

[30] Therefore, this court is of the view that it is bound to consider the purpose for which Act 829 and Act A1641 were enacted and give such object and purpose due effect.

[31] Section 38C(3) of Act A1641 is an extension of the temporary reliefs initially introduced by the Legislature under Act 829 to reduce the impact of Coronavirus Disease 2019 (COVID-19).

[32] The fact that s 38C(3) of Act A1641 is an extension of ss 35(1), 35(2) and 35(3) of Act 829 is abundantly borne out by the Hansard dated 16 December 2021:

(a) it was necessitated as a result of the extension of various Movement Control Orders and different phases of the national recovery plan introduced in 2021;

(b) the third exemption is meant to cover the period starting from 1 January 2021 until 31 December 2021; and

(c) the exemption is intended to allow businesses affected by the various restrictions reasonable opportunity to recover, so as to stimulate long-term economic growth.

[33] As such s 38C(3) of Act A1641 was *gazetted* to provide a temporary relief to matters relating to housing construction wherein vacant possession was due to be delivered in the year 2021.

[34] Therefore, I am of the view that s 38C(3) of Act A1641 must be interpreted with special emphasis placed on the retrospective application of the exemption, and the mischief of protecting the developer in the specific context of delivery of vacant possession.

[35] This court views that the strict reading of s 38C(3) of Act A1641 as advocated by the applicants is misconceived for the obvious reason that such reading defeats every purpose for which s 38C(1) of Act A1641 was introduced.

[36] Section 38C(1) of Act A1641 provides exemption for the period from 1 January 2021 to 31 December 2021. Act A1641 only came into effect on 13 January 2022. The third respondent in the present case could only apply for the third exemption after 13 January 2022 ie after Act A1641 was operative. In this case, the third respondent applied for the third exemption on 16 February 2022. It was not disputed that the non-delivery of vacant possession on 12 September 2021 (based on a 48 months completion period) falls within the period for which the third exemption was intended under s 38C(1) of Act A1641.

[37] The applicants suggest that a literal interpretation needs to be given by the first respondent in respect of interpreting provisions of s 38 of Act 829. However, the provision would then be rendered illusory to the third respondent as it is impossible for the third respondent to have made the application prior to its *gazettement* despite suffering hindrances in delivering vacant possession throughout 2021.

[38] In the present case, when the third respondent applied for the third exemption on 16 February 2022, vacant possession had not been delivered by the third respondent to the applicants. Vacant possession was only delivered by the third respondent vide a letter dated 7 December 2022 and 8 December 2022.

[39] The fact that actual vacant possession was only delivered in December 2022 lends credence to the third respondent's case that the construction progress was truly hampered by the pandemic and more time was indeed required for the third respondent to complete and deliver the project.

[40] Further, I find that the third respondent had vide its application cover letter dated 24 February 2022 listed down the timeline and various MCOs' and recovery phase(s) implemented throughout 2021, reproduced as follows:

JADUAL 1.0

Bil	Perkara	Tarikh Mula	Tarikh Akhir	Jumlah Hari	Jumlah Terkumpul
1	PKPB	1 Januari 2021	12 Januari 2021	12	12
2	PKP 2.0	13 Januari 2021	4 Mac 2021	51	63
3	PKPB 2.0	5 Mac 2021	6 Mei 2021	63	126
4	PKP 3.0	7 Mei 2021	31 Mei 2021	25	151
5	PKP Penuh	1 Jun 2021	28 Jun 2021	28	179
6	PPN Fasa 1	29 Jun 2021	9 Sept 2021	73	252
7	PPN Fasa 2	10 Sept 2021	30 Sept 2021	21	273
8	PPN Fasa 3	1 Okt 2021	17 Okt 2021	17	290
9	PPN Fasa 4	18 Okt 2021	31 Dis 2021	75	365

[41] Given the above, I view that the first respondent acted rationally and within the ambit of powers conferred upon him when interpreting the provisions of s 38(C)(1) and (3) of Act A1641 with the purpose underlined in the preamble of Act 829, notwithstanding the expiration of vacant possession period, ie to provide temporary relief to reduce the impact of MCO and recovery phases during the COVID-19 pandemic throughout year 2021.

The second respondent has no power to sign any letters granting EOTs under Act A1641 and the HDA

[42] The applicants contended that the second respondent signed the letter informing the approval of the third exemption on behalf of the first respondent without proper notification of delegation of power.

[43] The applicants relied on the Federal Court case of *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2019] 6 MLRA 494; [2020] 1 CLJ 162; [2019] 8 AMR 297 which made it clear that should the Minister be empowered by any written law to exercise any powers or perform any duties, he may by notification in the *gazette* delegate such powers or duties.

[44] However, the argument raised by the applicants was devoid of merit. I find this point was answered by the Federal Court as question [4] in *Ang Ming Lee*. There, the Federal Court held that:

(a) generally, a Minister need not sign a letter personally;

(b) what is crucial is not whether the Minister signed the letter personally, but whether the decision conveyed in the letter was made by the Minister

and whether the letter was in fact signed by the officer on behalf of the Minister; and

(c) the Minister may explain by affidavit whether he had in fact made the decision conveyed in a letter signed by his officer, and the officer was conveying the decision on his behalf.

[45] In the present case, I find that the second respondent had deposed in his affidavit confirming that the third exemption was indeed the decision of the Minister. This was supported by documentary evidence in the form of written minutes of the Minister recording the decision of the Minister. The second respondent had further averred in his affidavit that the letter dated 26 April 2022 was signed by the second respondent conveying the said Minister's decision.

[46] The content of the first respondent's decision is repeated herein below:

> Para 3. Berdasarkan Bahagian XIA, Subseksyen 38C(1) dan Subseksyen 38C(2) di bawah Akta tersebut, dimaklumkan bahawa permohonan pihak Tuan bagi pemajuan yang telah dilesenkan seperti di atas *telah pun dipertimbangkan dan diluluskan oleh YB Menteri* melalui minit bebas no rujukan: KPKT/07/PS/828/6 Jld 1(108) ... (Emphasis added).

[47] The important phrase in para 3 is '... telah pun dipertimbangkan dan diluluskan oleh YB Menteri ...' wherein it is clear that the decision referred in the EOT is a decision made by the Minister.

[48] The second respondent had affirmed that the letter communicating the first respondent's decision was executed by the second respondent on the instructions of the first respondent, as the first respondent had to evaluate 113 other similar applications.

[49] The second respondent has further affirmed that the contents of the letter dated 26 April 2022 clearly state that the second respondent is merely communicating the decision of the first respondent.

[50] Given the above, this court views that the contents of the said letter itself clearly mentioned that the third exemption was a decision by the first respondent and the second respondent was only instructed to convey the said decision on behalf of the first respondent.

The EOT granted by the first respondent by way of a letter dated 26 April 2022 signed by the second respondent was done without the consent of the applicants, without the applicants being given a right to be heard and without taking into account relevant considerations

[51] The applicants are challenging the decision of the first respondent dated 26 April 2022, contending that a right to be heard was not offered to the applicants' and subsequently coupled with the first respondent's failure to take into account relevant objections and/or consideration.

[52] On this issue, I find that it was raised in Parliament with specifically mention of the case of *Ang Ming Lee* as decided by the Court of Appeal. (see: Hansard Dewan Rakyat on pp 41–42 dated 16 December 2021).

[53] The Minister in his reply had distinguished the decision in *Ang Ming Lee*, on the ground that the measure introduced under Act 829 and Act A1641 is an exemption and not an extension of time. The Minister explained that an exemption brings about the effect of 'suspending time' or 'freezing time' which is conceptually different from an extension of time. In effect, it is safe to surmise that Parliament has deliberately chosen not to accord a right to be heard to the purchasers or there is no requirement for obtaining the consent of the purchasers for purposes of the exemptions (see: Hansard Dewan Rakyat on p 52 dated 16 December 2021).

[54] I am of the view that the decision of Parliament is reasonable and has a rational basis in that Parliament had considered that the Minister will be inundated with applications and letters from developers and purchasers alike (see: p 55 Hansard Dewan Rakyat dated 25 August 2020).

[55] Given the limited time for the Minister to consider and to make a decision, coupled with the continuing in force of movement control order at the material time, it is simply impracticable for the Minister to hear all the purchasers before making a decision.

[56] The Court of Appeal in the case of *Bludream City Development Sdn Bhd v Kong Thye & Ors and other appeals* [2022] 2 MLJ 241; [2022] 3 MLRA 257; [2022] 2 CLJ 829 held as follows:

> [66] Whereas *here, there is no express requirement of a right to be heard that must be given to the purchasers, what is important is that the Minister must act fairly*, taking into consideration that the purchasers here, being purchasers, are not obliged to consent to any extension of time implored by the developer. The Minister is thus entitled to proceed on the assumption that the purchasers would not agree to any extension of time.
>
> [67] The Minister, in discharging his duty under the Act, would have to take the interest of the purchasers into consideration as he is entrusted under the HDA to safeguard the rights of the purchasers under s 11 thereof ...
>
> [68] *There is thus no need to hear the purchasers individually or independently unless he has some doubts as to how the purchasers' interest may best be safeguarded* as in various options and permutations open to the purchasers ...

A

> [69] What is required of *the Minister here is to act honestly and by honest means; to act justly and to reach just ends* by just means in relation to natural justice in an administrative law context ...
>
> [70] Whilst the purchasers may only be able to see parochially through the tainted glass of 'we cannot be deprived of our right to claim for LAD for late delivery', *the Minister would have to take the broader view as to whether the developer would be in a position to complete the project if they are at the same time being saddled with a claim for LAD* which worked out to be about 12% of the purchase price of each unit delayed if there had been no second extension. (Emphasis added).

B

C

[57] It is to be noted the authority of *Bludream* is in regards to a decision made by the Minister exercising his powers under reg 12 of the HDR 1989 wherein the Court of Appeal had in detailed judgment iterated the considerations a Minister would need to consider in making a decision in regards to an EOT involving housing laws.

D

[58] Based on *Bludream* it can be summarised as follows:

(a) there was no express requirement of a right to be heard that must be given to the purchasers;

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(b) what was important was that the Minister must act fairly, taking into consideration that the purchasers were not obliged to consent to any extension of time implored by the developer; and

(c) the Minister was entitled to proceed on the assumption that the purchasers would not agree to any extension of time.

F

[59] In the present case, I find that those considerations and competing interests mentioned in the *Bludream* were in fact brought to the attention of the Minister and the Minister had in fact considered the competing considerations before making a decision (see: paras 22–24, encl 22).

G

[60] Given the above ratio, it is my view that in the absence of hearing individual purchasers, the first respondent has acted honestly and fairly in allowing the third respondent's application for exemption taking into account the following:

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(a) limitation of workforce due to implementation of SOP;

(b) limitation to procure construction material(s) due to worldwide and/or nationwide implementation of MCO and SOP's;

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(c) limited supply of skilled labour; and

(d) delay in procuring CCC as SOP dictated operations at minimal level and introduction of work from home concept.

[61] The third respondent's application was supported by technical comments provided by the architect of the development supported with various letters from various contractors confirming the restrictions, subsequently seeking an extension of time to carry out their respective obligations.

[62] Further, the first respondent vide its affidavit confirms to have taken into detailed account the following:

(a) the impact on the purchaser should the exemption be granted -vs- the government's commitment to provide temporary relief to legal liabilities caused by the pandemic;

(b) the factors in the third respondent's application are common with other residential constructions; and

(c) an overview of the economic chain on which a housing developer relied.

[63] It is also pertinent to note that in allowing the said exemption, the first respondent had also imposed conditions beneficial to the applicants such as:

(a) extended defect liability period ('DLP') period; and

(b) exemption from the late payment interest.

Section 38C of Act A1641 is unconstitutional

[64] The applicants in challenging the first respondent's decision averred that the relevant provisions of s 38(C) of Act A1641 is ultra vires the FC. The gist of the applicant's submission was that LAD was a 'property' for which LAD shall not be 'compulsorily acquired or use' 'without adequate compensation' as guaranteed under arts 13(1) and (2) of the FC.

[65] It is to be noted that s 38C of Act A1641 is an extension of ss 35(1), 35(2) and 35(3) of Act 829 to cover the period of 2021. I find that the applicants accepted the constitutionality of the first and second exemption for the period of 2020. However, the applicants failed to explain why s 38C of Act A1641 which covers the later period of 2021 is unconstitutional while the constitutionality of the previous period in 2020 was not disputed.

[66] It is my view that there cannot be two different treatments for the period of 2020 to 2021 where both periods suffered the same effect of COVID-19, and the various lockdowns and measures introduced to curb the spread of the virus.

[67] Further, I find that all the relevant provisions found in Act 829 and Act A1641 represent a legislative response and compromise for otherwise a force majure incident. To contend that s 38C of Act A1641 is unconstitutional is to disturb the compromise and balancing provisions variously found in ss 38B, 38D and 38E of Act A1641 which a purchaser stands to benefit from.

[68] This court is of the opinion that without s 38C of Act A1641, it is an incident of force majure, the effect of which is that the SPA stands frustrated under s 57(2) of Contracts Act 1950 (Act 136) by cross-restitution between the purchaser and the developer. The outcome of a frustrated contract on account of force majure is mutually undesirable to the contracting parties where the purchaser would have to return the house to the developer for a refund by the developer of all purchase monies paid it's a lose-lose situation.

[69] It is pertinent to note that the rights guaranteed under the FC is a permanent right and the reliefs provided for under Act 829 (and subsequent amendments therein) are temporary reliefs granted to curb the COVID-19 pandemic.

[70] Therefore, I am of the view that temporary reliefs under Act 829 cannot be viewed as a permanent intrusion into rights guaranteed under the FC.

[71] I find support for my view by referring to the case of *Saravanan a/l Sangaralingam & Ors v Pengawal Perumahan & Ors* [2022] MLJU 2573; [2022] 1 CLJU 2434 where my learned brother Wan Ahmad Farid J refused to declare s 35 of Act 829 as ultra vires the FC when His Lordship held as follows:

> [30] First and foremost, let me underline that the COVID-19 Act is not an ordinary Act of Parliament. To begin with, as reflected in the preamble of the Act, it was designed to provide temporary measures to reduce the impact of COVID-19. By definition, what is temporary is not meant to be permanent. In the circumstances of the case, the COVID-19 Act should not be viewed as a permanent intrusion into the rights guaranteed by the Federal Constitution ...

[72] Added to that, I find that provision of s 38(C) of Act A1641 provides reliefs for both the developer and the homebuyers while s 38(C)(1) of Act A1641 provides for exemption in favour of the developer, s 38(B)Act 829/A1641 has provided the restriction of any late payment charges in favour of the purchasers.

[73] Therefore, given the above, I view that the provision of ss 38(C) and 38(B) is proportionate to the objectives laid down in the preamble of Act 829 providing temporary relief to both purchaser and developer without discrimination.

A CONCLUSION

[74] Premised on the aforesaid reasons, I am of the considered view that:

(a) there is no irrationality on the part of the first respondent in allowing the exemption dated 26 April 2022, after taking into account relevant considerations and limitations of the construction industry during the COVID-19 pandemic including giving a purposive interpretation to the provision of Act 829;

(b) the exemption dated 26 April 2022 is not tainted with illegality as it was a decision by the first respondent made pursuant to powers conferred under s 38(C) of Act A1641, and did not act exceeding those powers;

(c) the exemption dated 26 April 2022 is not tainted with procedural impropriety, as the Parliament intended to confer discretionary powers to the first respondent to make such decisions wherein first respondent applied its mind and acted fairly taking into account relevant consideration and balancing the interest of both purchaser and developer;

(d) the communication of the first respondent's decision by the second respondent is not illegal and in excess of the second respondent's powers and authority;

(e) provisions of s 38(C) of Act A1641 is a temporary relief and is proportional to both parties, thus does not qualify to be ultra vires of the articles of the FC.

[75] As such, I dismissed the applicant's application of judicial review (encl 10). Costs of RM2,500 without allocator to be paid by the applicants to the first and second respondents except to the third respondent where the applicants is to pay costs in the sum of RM2,500 subject to the allocator.

Applicants' application for judicial review dismissed with costs of RM2,500 without allocator to be paid by applicants to first and second respondents and costs of RM2,500 subject to allocator to be paid by applicants to third respondent.

Reported by Dzulqarnain Ab Fatar